

THE DEATH KNELL OF ISSUE CERTIFICATION AND WHY THAT MATTERS AFTER *WAL-MART V. DUKES*

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INTRODUCTION

The Supreme Court has become increasingly attuned to the reality of modern civil litigation that sees litigants spending a fortune to “try” cases that almost never go to trial.¹ By most accounts, well over ninety percent of civil cases settle or are otherwise resolved without trial,² curtailing a process that still costs companies billions of dollars a year and consumes a growing share of their revenues.³ At every milestone in the life of a case—from complaint to judgment (or more realistically, from investigation to appeal)—costs escalate exponentially, putting pressure on defendants to settle. A denial of a motion to dismiss, for instance, cranks up discovery and, as a result, the billable-hour meter.⁴

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1. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (“[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.”).

2. *See, e.g.*, ADMIN. OFFICE OF THE U.S. COURTS, ANN. REP. OF THE DIRECTOR 158 (1985) (showing that about ninety-five percent of cases filed settled or were otherwise disposed of before trial between 1976 and 1985); PRESIDENT’S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 7 (1991) (“[M]ore than 92 percent of all civil lawsuits are settled or otherwise disposed of prior to trial”); Kevin C. McMunigal, *The Cost of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 U.C.L.A. L. REV. 833, 838 n.15 (1990) (“In 1988, only 5.3% of the civil cases terminated in the federal courts ended in trial.”); *Government Survey Shows 97 Percent of Civil Cases Settled*, PHOENIX BUS. J., (May 30, 2004, 9:00 PM), <http://www.bizjournals.com/phoenix/stories/2004/05/31/newscolumn5.html?page=all> (noting a study that estimated ninety-seven percent of cases settle or are dismissed before trial); Jonathan D. Glater, *Study Finds Settling Is Better Than Going to Trial*, N.Y. TIMES (Aug. 7, 2008), <http://www.nytimes.com/2008/08/08/business/08law.html> (noting that an estimated eighty to ninety-two percent of cases settle).

3. LAWYERS FOR CIVIL JUSTICE ET AL., LITIGATION COST SURVEY OF MAJOR COMPANIES 2 (2010), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf> (noting the increasing portion of revenue—on average \$115 million in 2008 per survey respondent—spent on litigation costs that do not include judgments and settlements).

4. *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ELECTRONIC

Few litigation milestones are as significant as class action certification. Indeed, the very Rules that permit class treatment recognize that a certification order “may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.”⁵ This concern, and the related worry that a denial of certification can, as a practical matter, spell the end of litigation for plaintiffs, have earned certification orders the ominous “death knell” ascription, as well as a separate provision for challenging them through interlocutory appeals.⁶

It is not surprising then that the Supreme Court has taken a special interest in issues surrounding class certification. After tightening up the pleading standard in the antitrust context—noting that “the threat of discovery expense” can push some defendants to “settle even anemic cases”⁷—and after it confirmed that the standard applies in all other civil cases,⁸ it turned to class actions. This article explores the Court’s recent jurisprudence in the class action area.

The Court started off its quest in earnest in the much-publicized *Wal-Mart Stores, Inc. v. Dukes*⁹ litigation, producing an opinion that was instantly dubbed a watershed moment in class action jurisprudence.¹⁰ Five Justices agreed that not a single Rule 23(a)(2)¹¹ common question united a class of 1.5 million Wal-Mart employees challenging the corporate culture of a company that, according to them, discriminated against women. *Dukes* has not left the mark that most had envisioned. The class was just too big, the challenged policies too discretionary, and the case too unusual

DISCOVERY: A VIEW FROM THE FRONT LINES 3–4, 25 (2008), http://iaals.du.edu/images/wygwam/documents/publications/EDiscovery_View_Front_Lines2007.pdf (noting that e-discovery costs about \$3.5 million for an average lawsuit); see also *In re Fannie Mae Sec. Litig.*, 552 F.3d 814, 817 (D.C. Cir. 2009) (“The total amount [the nonparty agency] spent on the individual defendants’ discovery requests eventually reached over \$6 million, more than 9 percent of the agency’s entire annual budget.”).

5. See FED. R. CIV. P. 23 advisory committee’s note.

6. See FED. R. CIV. P. 23(f); *Newton v. Merrill Lynch*, 259 F.3d 154, 162 (3d Cir. 2001) (“Recognizing that denying or granting class certification is often the defining moment in class actions (for it may sound the ‘death knell’ of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants), the Rule acknowledges the extraordinary nature of class actions and permits the appellate courts to develop a coherent body of jurisprudence in this area.”).

7. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

8. See generally *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

9. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2547 (2011).

10. See, e.g., John M. Husband & Bradford J. Williams, *Wal-Mart v. Dukes Redux: The Future of the Sprawling Class Action*, 40 COLO. LAW. 53 (2011) (labeling *Dukes* the most anticipated employment law decision in a decade and characterizing it as “the Court’s first major pronouncement on Federal Rule of Civil Procedure (Rule) 23 prerequisites in twelve years”).

11. FED. R. CIV. P. 23(a)(2).

for it to control the outcome of other national class actions, where more concrete policies or transgressions tie class members together. But *Dukes* is hardly inconsequential. By limiting questions that qualify as common, it has—depending on whom you ask—refined or poisoned the Rule 23(b)(3)¹² predominance inquiry, which weighs common questions against individual ones to decide whether class action treatment is justified. Quite simply, after *Dukes*, class plaintiffs have fewer common questions to take to the (b)(3) bank.

This has been less problematic for resourceful class counsel who utilize “issue certification” to isolate common elements of class claims while leaving individual parts for individual adjudications. Courts have generally sanctioned this controversial interpretation of Rule 23(c)(4).¹³ In fact, most have completely brushed aside individualized questions related to damages when certifying Rule 23(b)(3) class actions, finding common issues to predominate individual ones despite the frequent need for independent hearings to assess particular injury. Other courts, employing more innovative uses of issue certification, have even severed elements pertaining to liability, such as causation, for individual trials.

A 2013 high court decision, *Comcast Corp. v. Behrend*,¹⁴ might have put an end to issue certification, and to paraphrase our Vice-President, that’s a big darn deal. Again, the Court has chosen an antitrust action to make an important pronouncement. The proponents of class treatment in *Comcast*, Justice Scalia wrote for a 5-4 majority, failed to show that damages from the alleged antitrust violation were susceptible to classwide proof.¹⁵

The significance of *Comcast* has, and will continue to be, debated. Some will interpret *Comcast* as requiring classwide proof of damages in every (b)(3) class. It is difficult to square that reading with another class-action decision from the same term, *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*,¹⁶ where the Court rejected the notion that a plaintiff seeking class certification must “prove that each ‘elemen[t] of [her] claim [is] susceptible to classwide proof.’”¹⁷ But the dissent’s view of *Comcast*,

12. FED. R. CIV. P. 23(b)(3).

13. See *In re Nassau County Strip Search Cases*, 461 F.3d 219, 226–227 (2d Cir. 2006); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 439 (4th Cir. 2003); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996)

14. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

15. *Id.* at 1433.

16. *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013).

17. *Id.* at 1196.

which purports to limit the majority decision for “this day and case only,”¹⁸ is no more persuasive; it too has, in effect been rejected, by the Court’s subsequent vacatur of decisions that minimized damage-related determinations. More likely, *Comcast* has added injury to the predominance inquiry, requiring courts to weigh individual issues across entire class claims—liability *and* damages—in deciding whether (b)(3) class treatment is appropriate. This has the effect of disarming class plaintiffs by taking away their most potent weapon against *Dukes*—issue certification.

This article begins by examining the effect of *Dukes*, detailing in Section I how the Court’s pronouncement has been felt most acutely by class plaintiffs seeking to certify Rule 23(b)(3) classes.¹⁹ Section II explains why that is significant in light of the Court’s most recent cases and orders.²⁰ It profiles *Comcast*’s unusual trip through the appellate process and offers two competing interpretations of the Court’s opinion around which distinct camps at the lower court level have already coalesced. Neither camp, however, the Section argues, understands the disagreement between the majority and dissenting views in *Comcast* or the Court’s other 2013 decision and orders. Section III concludes that when read in context, *Comcast* guts the controversial lower court practice of certifying discrete issues for class treatment.²¹ That matters because after *Dukes*, trying common issues has been the class counsel’s most reliable tool navigating hostile Rule 23(b)(3) terrain.

I. THE SURPRISING LEGACY OF *DUKES*: SETTING UP A HIGHER (B)(3) HURDLE

Wal-Mart v. Dukes has not had the effect that most predicted. By asking how a discretionary employment policy will be adjudicated for 1.5 million class members, it elevated a hitherto minimal inquiry of common class questions into a forward-looking test about common answers. This has not been the blow to non-damage²² that commentators and the *Dukes* dissent predicted for employment litigation. Most employment policies have some uniform element to which class counsel can tie their case; most courts have not asked for more. But *Dukes* matters: it has influenced the

18. *Comcast*, 133 S. Ct. at 1437 (Ginsburg & Breyer, JJ., dissenting).

19. See discussion *infra* Part I.

20. See discussion *infra* Part II.

21. See discussion *infra* Part III.

22. See FED. R. CIV. P. 23(b)(1)–(2).

more important Rule 23(b)(3) predominance requirement by limiting the type of common questions that count towards this “rigorous” inquiry.

Although every putative class action must first satisfy Rule 23(a)²³ prerequisites (by showing numerosity, commonality, typicality, and adequacy of representation), class counsel will usually focus on Rule 23(b) when developing their case because those elements have traditionally posed the higher hurdle. To convince a trial court that class treatment is appropriate, plaintiffs must show that they either seek to avoid inconsistent rulings,²⁴ are pressing for common injunctive relief,²⁵ or present common questions that “predominate” over individual ones and make class actions superior to other available methods “for fairly and efficiently adjudicating the controversy.”²⁶ It is the last provision that plaintiffs generally use to seek damages on behalf of a class and is the focus of this article.²⁷ To be sure, some courts have awarded class-wide damages if they are “incidental” to injunctive relief. But even that practice has been put in doubt by *Dukes* where all nine Justices agreed that a (b)(2) certification did not permit plaintiffs to seek backpay—relief that lower courts had commonly assumed to be “incidental” to injunctions of discriminatory policies.²⁸

In *Dukes*, female Wal-Mart employees brought a discrimination case against the company alleging that local managers around the nation favored men in pay and promotion decisions.²⁹ It was undisputed that the decisions were entirely discretionary; the only “policies” that the plaintiffs could identify were the company’s delegation of discretion to local managers and a general corporate culture that purportedly engendered bias against women.³⁰ Despite the limited overlap in the grievances of the purported class members, most judges before *Dukes* would likely have sided with the two lower courts that *Dukes* reversed, finding at least one common

23. FED. R. CIV. P. 23(a).

24. FED. R. CIV. P. 23(b)(1).

25. FED. R. CIV. P. 23(b)(2); *See also* FED. R. CIV. P. 23(b)(2) advisory committee’s note. Rule 23(b)(2) also permits actions for “corresponding declaratory relief,” but that adds little to the injunctive relief requirement. FED. R. CIV. P. 23(b)(2). As the Advisory Committee notes to the Rules make clear, “[d]eclaratory relief ‘corresponds’ to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief.” FED. R. CIV. P. 23(b)(2) advisory committee’s note. Declaratory relief, in other words, must be tethered to a classwide injunction. *Id.*

26. FED. R. CIV. P. 23(b)(3).

27. *Amchem Prods. v. Windsor*, 521 U.S. 591, 614–15 (1997) (“Rule 23(b)(3) added to the complex-litigation arsenal class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded.”).

28. *Dukes*, 131 S. Ct. at 2545.

29. *Id.* at 2547.

30. *Id.* at 2548.

question, like whether providing “[managers discretion over pay is] an unlawful employment practice[.]”³¹ But the majority wanted more—it required a uniform practice that would have compelled managers to discriminate.³² The adjudication of that practice could, unlike plaintiffs’ other allegations, be resolved on a classwide basis.³³

The principle criticism of *Dukes* is that it injected Rule 23(b)(3) predominance-like questions into the (a)(2)³⁴ commonality inquiry. Justice Ginsburg, writing for the dissent, lamented that the majority completely morphed the former into the latter, with unfortunate consequences for future (b)(1) and (b)(2) classes: “The Court’s emphasis on differences between class members mimics the Rule 23(b)(3) inquiry into whether common questions ‘predominate’ over individual issues. And by asking whether the individual differences ‘impede’ common adjudication, . . . the Court duplicates 23(b)(3)’s questions whether a ‘class action is superior’ to other modes of adjudication.”³⁵ Commentators have, for the large part, echoed this criticism.³⁶

As it turns out, however, it is (b)(3) classes that have felt the brunt of *Dukes*. It is true that on paper *Dukes* only tightened up the Rule 23(a)(2) commonality requirement—long assumed to be a gimme.³⁷ The exercise used to consist of lining up class claims and pointing to at least one common question. No longer. *Dukes* holds that the proper inquiry is not about identifying common questions, but determining how those questions will be answered; if the exercise is too individualized—an issue previously thought to be addressed under Rule 23(b)(3)—then the commonality element is not met.³⁸ Early returns on *Dukes*, however, show that in practice the commonality requirement is largely unaffected. Diligent class counsel have been careful to isolate concrete common policies for certification, and lower courts have, for the most part, read *Dukes* narrowly, as a bar to certifying policies that do no more than delegate discretion.³⁹

31. *Id.* at 2565 (Ginsburg, J., concurring in part and dissenting in part).

32. *Id.* at 2554–55 (majority opinion).

33. *See id.*

34. FED. R. CIV. P. 23(a)(2).

35. *Dukes*, 131 S. Ct. at 2566.

36. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 488 (2013) (“[B]y conducting an implicit predominance analysis under the guise of commonality, parties get none of the benefit of the jurisprudence surrounding predominance that might otherwise be useful in litigating that question . . .”).

37. *See, e.g.*, *Scholes v. Stone*, 143 F.R.D. 181, 185 (N.D. Ill. 1992) (“[T]he commonality requirement has been characterized as a ‘low hurdle’ easily surmounted.”); *see also* *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994).

38. *See Dukes*, 131 S. Ct. at 2551.

39. *See, e.g.*, *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1229 (10th Cir. 2013) (denying certification

In fact, even practices that appear to do no more than that—allow for discretionary decisions—have sometimes survived *Dukes*. In *McReynolds v. Merrill Lynch*,⁴⁰ a unanimous Seventh Circuit panel accepted a Rule 23(f) interlocutory appeal and found the commonality element satisfied by drawing what one district court within the circuit described as a “razor-thin”⁴¹ distinction from *Dukes*.⁴²

The challenged policies in *McReynolds* permitted financial advisors to team with one another and allowed managers to use their discretion and objective factors to distribute accounts. Judge Posner, writing for the panel, analogized the policies to a police department that allows its officers to select partners—a decision that he thought could be challenged by class plaintiffs if it turned out that male officers never wanted to pair with women.⁴³ The court found the hypothetical distinguishable from *Dukes* (though with an “undoubted resemblance”), pointing to the department’s decision to allow this method of partnering, but indistinguishable from the facts in *McReynolds*, where discretion was also exercised under the employer’s umbrella policies. The court reversed and remanded for the district court to certify the class and to determine whether those policies had disparate impact on African American brokers. Merrill Lynch’s petitions for a rehearing *en banc* and for certiorari to the Supreme Court (at this interlocutory stage) were both denied.⁴⁴

At least in the Seventh Circuit then, *Dukes* appears to have changed little with regard to commonality: so long as plaintiffs can point to a policy that funnels discretionary decisions, their claims apparently “depend on the answers to common questions.”⁴⁵ *McReynolds* may represent a particularly aggressive reading of *Dukes*—at bottom, plaintiffs in both cases set to challenge corporate policies that delegated discretionary decisions to local managers. Courts in other circuits, however, have followed it, albeit in cases that appear to land a bit further from *Dukes*.⁴⁶ Thus, even under the

for class litigation over entirely discretionary policies); accord *In re Wells Fargo Residential Mortg. Lending Discrimination Litig.*, No. 08-md-01930 MMC, 2011 U.S. Dist. LEXIS 99830, at *14 (N.D. Cal. Sept. 6, 2011); *Rodriguez v. Nat’l City Bank*, 277 F.R.D. 148, 154–55 (E.D. Pa. 2011); *Daskalea v. Wash. Humane Soc’y*, 275 F.R.D. 346, 360 (D.D.C. 2011).

40. *McReynolds v. Merrill Lynch*, 672 F.3d 482 (7th Cir. 2012).

41. *Bolden v. Walsh Grp.*, 282 F.R.D. 169, 179 (N.D. Ill. 2012).

42. *McReynolds*, 672 F.3d at 488.

43. *Id.* at 489.

44. *Merrill Lynch v. McReynolds*, 133 S. Ct. 338 (2012).

45. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554 (2011).

46. See, e.g., *Bauer-Ramazani v. Teachers Ins. & Annuity Ass’n of America-College Ret. & Equities Fund*, 290 F.R.D. 452, 458 (D. Vt. 2013); *Calibuso v. Bank of Am. Corp.*, 893 F. Supp. 2d 374, 390 (E.D.N.Y. 2012) (“*Dukes* did not foreclose all class action claims where there is a level of discretion afforded to individual managers and supervisors.”); *Chen-Oster v. Goldman*,

heightened commonality standard, most serious cases will present at least one common question that can be answered on a class-wide basis.

But *Dukes* is not inconsequential, even if its effect on commonality has been modest. By limiting what questions are considered common to the class, *Dukes* indirectly alters the Rule 23(b)(3) predominance terrain, which hosts most certification battles. The two inquiries are related: as the Supreme Court has explained, “the predominance criterion is far more demanding [than the commonality requirement]”; indeed the former entirely “subsum[es]” the latter.⁴⁷ They are also linked. On certification motions, most district judges engage in step-by-step analyses, methodically moving through each requirement.⁴⁸ They stack up common questions that pass the Rule 23(a) commonality inquiry and determine whether for purposes of Rule 23(b)(3), those questions predominate or outweigh individual ones, whether by their significance or sheer number.⁴⁹

After *Dukes*, fewer questions qualify as common, and, as a result, it has been more difficult for them to predominate.⁵⁰ None of this is surprising: When you raise a ladder’s first step, you inevitably raise the second, and the ladder as a whole becomes harder to climb. Class counsel have anticipated the higher first step and prepared their cases accordingly; most clear it with little trouble. But the second step—already too high for many cases—will now present an even bigger challenge. It is this phenomenon that appears to be the lasting legacy of *Dukes*.

Sachs & Co., 877 F. Supp. 2d 113, 117, 119 (S.D.N.Y. 2012).

47. See *Amchem Prods. v. Windsor*, 521 U.S. 591, 609, 623–24 (1997); see also Suzette M. Malveaux, Colloquy, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U. L. Rev. 34, 48 (2011) (“In all circuits, the predominance standard has long been the Grim Reaper of putative class actions . . .”).

48. *McReynolds*, 672 F.3d at 488–92; See *infra* Part III. Judge Posner, who has at times designated himself to sit as a trial judge, and who as a circuit judge has authored most of the influential class action decisions in the Seventh Circuit, including *McReynolds*, is an exception—his analyses tend to focus almost exclusively on efficiency. More on that later. *Infra* Part III.

49. *Dukes*, 131 S. Ct. at 2556 (explaining the link between commonality and predominance, noting that for common questions to predominate over individual ones under (b)(3), there must be at least one common question); see also *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 506 (N.D. Cal. 2012); *In re Heartland Payment Sys.*, 851 F. Supp. 2d 1040, 1054 (S.D. Tex. 2012).

50. See, e.g., *Franco v. Conn. Gen. Life Ins. Co.*, 289 F.R.D. 121, 130–31, 133 (D.N.J. 2013) (applying *Dukes* to commonality question and finding that criterion satisfied, but holding that the common questions do not predominate individual ones); accord *Smith v. Family Video Movie Club, Inc.*, No. 11-CV-1773, 2013 U.S. Dist. LEXIS 54512, at *8, 36–37 (N.D. Ill. Apr. 15, 2013); *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, No. 08-MD-1954, 2013 U.S. Dist. LEXIS 39055, at *14–15, 49 (D. Me. Mar. 20, 2013); *Miller v. Farmers Ins. Grp.*, 10-CIV-466-F, 2012 U.S. Dist. LEXIS 188026, at *27–28, 55 (W.D. Okla. Mar. 22, 2012).

II. THE HIGHER (B)(3) HURDLE MAY NO LONGER BE SIDE-STEPPED

Enterprising attorneys could (and have) overcome the demanding predominance bar through the creative use of “issue certification”—a controversial technique that allows class treatment of discrete common issues in cases that do not otherwise fully satisfy any of the Rule 23(b) requirements. Most appellate courts have sanctioned the use of “issue classes” that allows plaintiffs who can meet the jurisdictional requirements—not a difficult task in most national class actions filed against major companies—with no shortage of favorable venues to file their actions and avoid the higher predominance burden that has flowed from *Dukes*. A paucity of common questions would not torpedo a damages class in these courts as plaintiffs isolate discrete issues to meet the predominance requirement. *Comcast*, however, may well have taken this option away.

A. *COMCAST V. BEHREND*—AN UNUSUAL PATH AND A PROVOCATIVE OPINION

Justices sitting on the Court today are clearly interested in class action litigation. In *Comcast*, a majority of the Justices massaged the writ of certiorari the Court had granted to reach a thorny question on the role that damages play at the class certification stage.⁵¹ Based on the review sought, *Comcast* was supposed to examine whether lower courts should resolve merits arguments bearing on Rule 23(b)(3) class certifications.⁵² Then, on the Court’s own insistence, the case became about admissibility of expert testimony: the Court granted certiorari to decide whether a class could be certified without “resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.”⁵³ But admissibility of expert testimony, while featured prominently if not exclusively in parties’ briefing, played virtually no role in the Court’s opinion.

51. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1430–35 (2013).

52. *Id.* at 1435 (Ginsburg & Breyer, JJ., dissenting). The Court granted certiorari on the following question: “[W]hether a district court may certify a class action without resolving ‘merits arguments’ that bear on [Federal Rule of Civil Procedure] 23’s prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3).” *Id.*

53. *Id.* (emphasis omitted).

The Court focused on one question, which it answered in the affirmative: whether obtaining class certification under Rule 23(b)(3) requires class plaintiffs to tie their theory of antitrust liability to classwide damages.⁵⁴ The purported antitrust violation in the case stemmed from Comcast's acquiring and swapping of its cable systems based outside of Philadelphia in exchange for those in Philadelphia, thereby securing a market share in the City that neared seventy percent.⁵⁵ Plaintiffs alleged violations of the Sherman Act, Sections 1 and 2, proffering four theories of liability.⁵⁶ The two lower courts approved only one of the four theories for class trial: the allegation that Comcast's activity deterred its competitors ("overbuilders") from entering the Philadelphia market, which in turn drove up Comcast's rates.⁵⁷ But while the courts whittled the theories down to one, Plaintiffs' damages expert did not; his model compared Philadelphia cable prices to those in other counties without regard, the Supreme Court found, to what anticompetitive behavior contributed to the price disparity.⁵⁸ In other words, the model failed to isolate damages caused by deterred overbuilding from the three other theories of liability. The Court held that this was fatal for (b)(3) class certification despite the fact that, as Justice Ginsburg pointed out in her dissent, the expert's model established causation in the ordinary (non-antitrust) sense by showing that Comcast's anticompetitive conduct resulted in higher rates.⁵⁹

B. DIVERGING INTERPRETATIONS AND IMPLICATIONS OF *COMCAST*

There are several plausible interpretations of *Comcast*, ranging from far-reaching to entirely inconsequential. Although it is still early, distinct and predicable camps have already formed at the lower court level. Class defendants will wave *Comcast* and argue that Rule 23(b)(3) class plaintiffs must now convince courts at the certification stage that damages are susceptible to classwide proof. Without such a showing, they will quote *Comcast* to say courts can anticipate that "[q]uestions of individual damage

54. *Id.*

55. *Id.* at 1430.

56. *Id.* at 1430–31.

57. *Comcast*, 133 S. Ct. at 1431.

58. *Id.*

59. *Id.* at 1438–39 (Ginsburg & Breyer, JJ., dissenting). (explaining that the damages expert sought to establish the last element of liability—higher prices—which he did by comparing benchmark counties, which provided “evidence that Comcast’s anticompetitive conduct, which led to a 60% market share, caused the class to suffer injuriously higher prices”).

calculations will inevitably overwhelm questions common to the class.”⁶⁰ This reading of *Comcast* would upend years of appellate court precedent and place an insurmountable stumbling block in front of many class plaintiffs, who have long assumed that individualized questions of damages can never defeat class certification. Indeed, as the dissent observes, the “[r]ecognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal.”⁶¹

Unmoved by that precedent, some district courts have embraced this interpretation of *Comcast*. They treat *Comcast* as standing for the simple yet radical proposition that damages must always be “measured classwide in order to sustain class certification.”⁶² Indeed, some courts, outside of the antitrust context, have already used the principle to reject (b)(3) class certification where plaintiffs had not devised ways to calculate damages across entire classes.⁶³

At the other extreme is the view that *Comcast*, as the dissent put it, “is good for this day and case only.”⁶⁴ This is so, the dissent explained, because the idea that injury must be measured on a classwide basis came from the district court and was never contested by the plaintiffs.⁶⁵ And the concession was hardly subtle—it was a point that plaintiffs’ counsel emphasized at oral argument, confirming Justice Kagan’s understanding that the parties continued to agree on the legal standard, which the plaintiffs

60. *Id.* at 1433 (majority opinion).

61. *Id.* at 1437 (Ginsburg & Breyer, JJ., dissenting).

62. *Med. Mut. of Ohio v. Smithkline Beecham Corp.*, No. 08-3301, 2013 U.S. Dist. LEXIS 85926, at *23 (E.D. Pa. June 19, 2013) (approving a settlement); *see also* *Smith v. Family Video Movie Club, Inc.*, No. 11-CV-1773, 2013 U.S. Dist. LEXIS 54512, at *34 (N.D. Ill. Apr. 15, 2013) (“[D]amages must be susceptible to measurement across the entire class . . .”).

63. *See, e.g.,* *Cowden v. Parker & Assocs.*, No. 09-323-KKC, 2013 U.S. Dist. LEXIS 72253, at *18 (E.D. Ky. May 22, 2013) (concluding that in a business tort action “Plaintiffs have offered no manageable way to calculate damages across the entire class and the individual damages calculations that would be required will inevitably overwhelm any questions common to the entire class”); *Montano v. First Light Fed. Credit Union (In re Montano)*, 493 B.R. 852, 860 (Bankr. D.N.M. 2013) (“If in fact Class 2 damages could be measured class-wide, Plaintiffs had an obligation to come forward with evidence thereof. They did not, and *Comcast* does not allow them the luxury of waiting until trial.”); *Roach v. T.L. Cannon Corp.*, No. 10-CV-0591, 2013 U.S. Dist. LEXIS 45373, at *10–11 (N.D.N.Y. Mar. 29, 2013) (rejecting class certification in an FLSA case because “Plaintiffs have offered no model of damages susceptible of measurement across the entire . . . class”).

64. *Comcast*, 133 S. Ct. at 1437 (Ginsburg & Breyer, JJ., dissenting).

65. *See id.* at 1430 (noting that it was uncontested that injury had to be measured on a classwide basis to satisfy the predominance requirement). The dissent in *Comcast* concluded that the majority opinion “breaks no new ground” and “should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable ‘on a classwide basis’” because that part of the decision was based on an uncontested observation by the district court. *Id.* at 1436 (Ginsburg & Breyer, JJ., dissenting).

“embraced” despite the exceedingly stringent bar they argued it had set.⁶⁶ Thus, the Court’s discussion of the classwide-damages model, the dissent seems to suggest, is dictum because it was not essential to resolving any non-disputed issue.⁶⁷

This view too has its subscribers: at least two district courts have already dismissed the majority’s observation about damages. One did so in a footnote, rejecting it as “merely dicta [that] does not bind this court.”⁶⁸ The other court thought *Comcast* did not tread “any new ground in class action law [and] . . . simply restate[d] rules from [*Dukes*], and other prior decisions.”⁶⁹ Still others, while not entirely shrugging off *Comcast*, have limited its application to the unusual cases where there is an analytical disconnect between theories of liability and resulting damages⁷⁰—an issue that most often surfaces in the antitrust context.⁷¹

66. Transcript of Oral Argument at 41–43, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) (No. 11–864) [hereinafter *Comcast Oral Argument*]; see also *Comcast Oral Argument, supra*, at 6 (addressing petitioner’s counsel, Justice Kagan noted that “the legal standard that was used was exactly the legal standard that you wanted, that the plaintiffs had to come in and show by a preponderance that they had a class-wide way to measure damages in this case”).

67. See *Cent. Green Co. v. United States*, 531 U.S. 425, 431 (2001) (dismissing a sweeping sentence from a prior decision that was “unquestionably dictum because it was not essential to our disposition of any of the issues contested” in that case).

68. *Harris v. comScore, Inc.*, No. 11-C-5807, 2013 U.S. Dist. LEXIS 47399, at *32–33 n.9 (N.D. Ill. Apr. 2, 2013); see also *Martins v. 3PD, Inc.*, No. 11-11313-DPW, 2013 U.S. Dist. LEXIS 45753, at *22–23 n.3 (D. Mass. Mar. 28, 2013) (noting the agreement between the parties on the legal standard in *Comcast*, which therefore did not “foreclose the possibility of class certification where some individual issues of the calculation of damages might remain . . .”).

69. *Manno v. Healthcare Revenue Recovery Grp, LLC*, 289 F.R.D. 674, 694 (S.D. Fla. 2013) (citations omitted).

70. See, e.g., *Wallace v. Powell*, Nos. 3:09-cv-286, 3:09-cv-0291, 3:09-cv-0357, 3:09-cv-0630, 3:09-cv-2535, 3:10-cv-1405, 2013 U.S. Dist. LEXIS 69001, at *81–82 (M.D. Pa. May 14, 2013); see also *Leyva v. Medline Indus. Inc.* 716 F.3d 510, 514 (9th Cir. 2013); *Medlock v. Host Int’l, Inc.*, No. 1:12-cv-02024-JLT, 2013 U.S. Dist. LEXIS 72740, at *12–13 (E.D. Cal. May 21, 2013) (“Far from rejecting that a measurement tool is inappropriate, the Court took issue with the particular measurement tool because it failed to tie the asserted damage to the sole, class-based theory alleged in the case.”).

71. See *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1439 (2013) (Ginsburg & Breyer, JJ., dissenting) (“The special antitrust-related difficulty present here stems from the manner in which respondents attempted to prove their antitrust injuries.”); see also *In re Urethane Antitrust Litig.*, No. 04-1616-JWL, 2013 U.S. Dist. LEXIS 69784, at *39–40 (D. Kan. May 15, 2013) (distinguishing *Comcast* in an antitrust case where there was no other alleged cause of damages for price-fixing); but see *Forrand v. Fed. Express Corp.*, No. 08-CV-1360, 2013 U.S. Dist. LEXIS 62252, at *7 (C.D. Cal. Apr. 25, 2013) (applying *Comcast* and finding the same disconnect in a labor case).

C. THE ONLY TENABLE INTERPRETATION OF *COMCAST* LEAVES A LASTING MARK ON CLASS ACTION LITIGATION

Neither view will likely endure as the cases go up the appellate chain and *Comcast* is subjected to closer inspection. The dissent does its best to downplay the Court's statements about classwide resolution of damages by pointing to the parties' agreement of the appropriate legal standard. But the majority's opinion was hardly the review of fact-finding that the dissent portrays.⁷² Instead, the Third Circuit's error was not following what the Court deemed to be "straightforward application of class-certification principles," which demanded an inquiry into whether damages were "capable of measurement on a classwide basis."⁷³

Any doubt as to whether *Comcast* was "good for this day and this case only," or even just good for the antitrust context, was all but put to rest by the Court's subsequent "GVR" orders granting certioraris, vacating the judgments, and then remanding two cases out of the Sixth and Seventh Circuits, where the panels permitted (b)(3) certifications despite individualized claims of damages.⁷⁴ The two cases were largely identical.⁷⁵ Judge Posner authored the Seventh Circuit's opinion, which addressed claims brought against Sears by users of the Kenmore-brand washing machines that the plaintiffs claimed were defective. Sears contended that certification was inappropriate under Rule 23(b)(3) because the machines had different design modifications, resulting in different (or non-existent) defects. The panel rejected this argument, explaining that the variations would result only in "individual questions [about] . . . the amount of damages owed particular class members."⁷⁶ In the court's view, this could not defeat certification because damages could be assessed in individual

72. See *Comcast*, 133 S. Ct. at 1433 n.5 (majority opinion) (rebutting the dissent's accusation that the Court was disturbing findings of fact but noting that if the relevant issue was grounded in such a finding the Court would reach the same result under the more stringent standard of review); see also *United States v. Virginia*, 518 U.S. 515, 589 n.5 (1996) (Scalia, J., dissenting) (stating *Comcast*'s authoring Justice's explanation of the standard for reversal of a finding of fact by two lower courts—a standard that calls for "very obvious and exceptional . . . error . . .").

73. *Comcast*, 133 S. Ct. at 1432–33.

74. *Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768 (2013); *Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013); see also Allan Dinkoff, '*Comcast v. Behrend*': *Bigger Than We Thought at First Blush?*, N.Y. L.J. (Apr. 25, 2013), available at <http://www.weil.com/news/pubdetail.aspx?pub=11819> (profiling *Ross v. RBS Citizens*, 667 F.3d 900 (7th Cir. 2012), which the Court also vacated in light of *Comcast*, though *RBS* turned on the interpretation of Rule 23(a)(2), not (b)(3) certification).

75. See *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 363 (7th Cir. 2012), cert. granted, judgment vacated by *Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768 (2013) (noting that the Sixth Circuit case was identical except that it did not involve one claim).

76. *Id.* at 361.

proceedings following a trial on liability.⁷⁷ The Sixth Circuit reached the same result in a case against Whirlpool, quoting its precedent that (b)(3) class treatment is appropriate “[n]o matter how individualized the issue of damages may be, [because] these issues may be reserved for individual treatment”⁷⁸ The Supreme Court appeared to disagree. It GVR’ed both orders in light of *Comcast*,⁷⁹ effectively settling the question of whether the decision has any significance beyond the case and antitrust law.⁸⁰

Yet the Sixth Circuit has remained defiant, once again affirming the district court’s order after reconsidering its prior opinion in light of *Comcast*, which it thought “has limited application.”⁸¹ The court brushed aside the Supreme Court’s GVR orders as mostly insignificant.⁸² It then pointed to the lower court’s certification of a liability class only, which was different, it reasoned, from *Comcast* where both damages and liability were deemed appropriate for class treatment by the lower courts.⁸³ The court did not square the ability to so bifurcate with *Comcast*’s suggestion that damages and liability could not be split. Instead, it seemed to read *Comcast* as merely “reaffirm[ing] the settled rule that liability issues relating to injury must be susceptible of proof on a classwide basis”⁸⁴ A mere reaffirmance of settled law, however, would not have indicated to the Supreme Court that there was a “reasonable probability” of reversal in light of *Comcast*—the standard for a GVR order.⁸⁵ True, the GVR did not, as the Sixth Circuit point out, “necessarily imply that the Supreme Court has in mind a different result in the case,” but it should have sent a signal to the panel that the Court believed *Comcast* changed the lay of the land for certain class actions.⁸⁶

But the plaintiff’s bar should not panic just yet. Neither *Comcast* nor the subsequent GVRs are affirmations of the other extreme view—that *Comcast* demands classwide proof of damages in every case. The decision

77. *See id.* at 362.

78. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 678 F.3d 409, 419 (6th Cir. 2012) (quoting *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988)).

79. *See Butler*, 133 S. Ct. at 2768; *Glazer*, 133 S. Ct. at 1722.

80. *See also* Xuedan Wang v. Hearst Corp., No. 12-CV-793, 2013 U.S. Dist. LEXIS 65869, at *27–28 (S.D.N.Y. May 8, 2013) (explaining why *Comcast* was not limited to antitrust cases).

81. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860 (6th Cir. 2013).

82. *See id.* at 845.

83. *See id.*

84. *Id.* at 860.

85. *See Wellons v. Hall*, 558 U.S. 220, 225 (2010).

86. *See In re Whirlpool Corp.*, 722 F.3d at 845.

staked out dichotomous positions, one presenting a model that plaintiffs argued could assess injury across the class and one that was completely disconnected from liability. Faced with the choice—arguably one artificially imposed by the majority—the Court required the former. But these choices are rare; more often, calculations of damages will introduce some individualized issues that must be balanced against common questions raised by other elements of the underlying class claims.

What *Comcast* and subsequent developments teach is that damages are no longer *sui generis* in the (b)(3) predominance context. Instead, they must be evaluated and weighed like all other class issues. Revealingly, the key passage in *Comcast* does not speak of predominance in general terms, but refers to the balance of issues in the case: “Without presenting another methodology, respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class.”⁸⁷

Some courts relying on *Comcast* appear to recognize this when they acknowledge individualized issues pertaining to damages and provide reasons for why those issues do not predominate.⁸⁸ Other courts conflate individualized inquiries with efficient ones, reasoning, for instance, that because damages could be proven through a “mechanical process,” there will not be individualized questions.⁸⁹ As another court explained, this is not always true because proof is often individualized even when aggregated.⁹⁰ But the faulty logic should not distract from the broader point: after *Comcast*, courts should always consider and weigh individualized issues related to damages.

Again, the Court’s recent precedent offers further support, implicitly rejecting the notion that classwide proof of damages is always required to obtain (b)(3) class certification. In the same term that it decided *Comcast*, the Court issued a less controversial decision in *Amgen Inc. v. Connecticut*

87. *Comcast*, 133 S.Ct. at 1433.

88. See *Williams v. Macon Cnty. Greyhound Park, Inc.*, No. 3:10-CV-191-WKW, 2013 U.S. Dist. LEXIS 45355, at *23–24 (M.D. Ala. Mar. 29, 2013) (“Admittedly, the damages calculations will involve some individualized inquiries, as Defendants devote much ink to pointing out, but not to the extent that those inquiries predominate over the common questions with respect to liability Here, the Q-Club card data stored in the IGT Advantage System will reduce the number of individual factual inquiries to a significant degree”); see also *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (distinguishing *Comcast* based on documents that show that the defendant’s “computerized payroll and time-keeping database would enable the court to accurately calculate damages and related penalties for each claim”).

89. See, e.g., *Parra v. Bashas’, Inc.*, No. CIV-02-0591-PHX-RCB, 2013 U.S. Dist. LEXIS 76792, at *106–08 (D. Ariz. May 31, 2013).

90. *Morangelli v. Chemed Corp.*, 275 F.R.D. 99, 107 (E.D.N.Y. 2011).

Retirement Plans and Trust Funds.⁹¹ *Amgen* held that class plaintiffs alleging Rule 10b-5⁹² federal securities-fraud need not show that a fraudulent statement was material in order to maintain a (b)(3) class.⁹³ The Court reasoned that the question of materiality is always common to the class: “[t]he alleged misrepresentations and omissions, whether material or immaterial, would be so equally for all investors composing the class.”⁹⁴ Materiality was key to class certification because it permitted the use of the fraud-on-the-market theory, which obviated the need to show that every class member relied on a purported misrepresentation.⁹⁵ The theory assumes an efficient market that incorporates material misstatements; the assumption gives rise to a rebuttable presumption of classwide reliance by the public.⁹⁶ Naturally, the defendant wanted the plaintiffs to establish materiality before the class was certified.⁹⁷ Both lower courts declined to impose the requirement, and so did the Supreme Court.⁹⁸

Although *Amgen* interprets the same provision of Rule 23, its connection to *Comcast* is not obvious. It is only on a closer read that *Amgen* dispels the intriguing notion that *Comcast* demands classwide proof of damages in every case. In fact, that each element of a class claim so requires was just what Justice Thomas argued in his *Amgen* dissent, pointing to reliance as an element that under the majority’s view plaintiffs could not establish for the entire class.⁹⁹ The Court picked up on this idea and rejected it: Rule 23(b)(3), the majority emphasized, “does *not* require a plaintiff seeking class certification to prove that each ‘element of her claim is susceptible to classwide proof.’ What the rule does require is that common questions ‘predominate over any questions affecting only individual [class] members.’”¹⁰⁰ A Rule 23(b)(3) analysis, in other words, is not an exercise of compartmentalization, but rather a holistic inquiry that does not ask for class-wide proof from each element of the claim.

91. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013).

92. 17 C.F.R. § 240.10b-5 (2013).

93. *Amgen*, 133 S. Ct., at 1203–04.

94. *Id.* at 1191.

95. *Id.* at 1193.

96. *Id.* at 1192.

97. *Id.* at 1191.

98. *Id.*

99. *Amgen*, 133 S. Ct., at 1210 (Thomas, J., dissenting) (arguing that a class plaintiff must “show that the elements of the claim are susceptible to classwide proof”). “It is only by establishing all of the elements of the fraud-on-the-market presumption that reliance can be proved on a classwide basis.” *Id.* at 1212.

100. *Amgen*, 133 S. Ct. at 1196 (majority opinion).

III. THE BEGINNING OF THE END OF ISSUE CERTIFICATION?

The interpretation of *Comcast* and *Amgen* does not bode well for issue certification, which by definition, compartmentalizes class claims to permit class treatment of discrete issues. Neither *Dukes* nor *Comcast* discuss issue certification, but their analyses suggest that it will come under increasing scrutiny.

Issue certification is a well-explored topic, and its roots need not be rehashed here. Briefly, its genesis is in Rule 23(c)(4), which provides that “[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues.”¹⁰¹ On its face, the provision supports the broad view that would essentially sanction a fourth type of class—an “issues class.” Its placement, however (outside of Rule 23(b)), as well as its history (adoption without significant fanfare), weigh against endowing a seemingly obscure provision with so much power.¹⁰² In any event, Rule 23(c)(4)’s meaning has divided appellate courts for years.¹⁰³ Most circuits that consider the question, including the Second,¹⁰⁴ Third,¹⁰⁵ Fourth,¹⁰⁶ Seventh,¹⁰⁷ and Ninth¹⁰⁸ hold that if common issues do not predominate over individual ones—thereby preventing class certification of the entire case—common issues can still be isolated for class treatment. The opposing view comes almost exclusively out of the Fifth Circuit,¹⁰⁹ which believes that issue certification “manufacture[s] predominance

101. Fed. R. Civ. P. 23(c)(4).

102. See Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709, 748 (2003) (“A review of the rulemaking history surrounding [Rule 23](c)(4)(A) confirms that its framers never intended for it to authorize expansive issue class actions”); see also Edward H. Cooper, Symposium, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 58 (1996) (explaining the unsuccessful proposal to permit issue classes under Rule 23).

103. See generally *In re St. Jude Med. Inc.*, 522 F.3d 836, 841 (8th Cir. 2008) (discussing various courts’ interpretations of Rule 23 and its applicability).

104. See *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006) (stipulating the procedure of managing cases under the application of Rule 23(c)(4)).

105. See *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 272–73 (3d Cir. 2011) (purporting not to join either camp regarding the ability to certify issue classes, but permitting issue certification provided that certain factors are met).

106. See *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 439 (4th Cir. 2003) (expressing the appropriateness of Rule 23(c)(4), when it should be applied, and how it should be imposed).

107. See *In re Allstate Ins. Co.*, 400 F.3d 505, 508 (7th Cir. 2005) (expressing a more efficient use of Rule 23(c)(4)).

108. See *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (reiterating the predominance requirements regarding class certification).

109. See *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) (describing the flaws of the district court’s approach regarding class trials); accord *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 422 (5th Cir. 1998) (reiterating *Castano*).

through the nimble use of subdivision (c)(4)[,]¹¹⁰ a provision that, the court explains, is nothing more than a “housekeeping rule” that allows a court to sever the common issues for a class trial.¹¹¹ District courts in other circuits generally follow the majority view.¹¹² The Supreme Court has repeatedly refused to resolve the circuit split,¹¹³ further stirring the debate among commentators who are also split and have not spared much ink.¹¹⁴

Comcast and *Amgen* have added fuel to the fire. By casting doubt on whether a (b)(3) class can sustain individual questions related to damages, *Comcast* has jeopardized the entire issue certification apparatus. As Professor McLaughlin explains in his leading treatise on class actions, the most common but perhaps least noticed form of issue certification is the certification of a liability class, *i.e.*, a class that puts off calculating damages to individual proceedings:

Although Rule 23(c)(4) receives extended discussion in relatively few cases, it is applied *sub silentio* to almost all certifications Rule 23(c)(4) is not routinely cited in the many decisions certifying classes despite obvious variations in the amount of class member damages, which will necessitate individualized proofs, but the Rule is the underpinning of the black letter principle that individual variations in the amount of damages sustained as a result of a common course of conduct will not preclude class certification.¹¹⁵

However, siphoning off damages from the rest of the class appears to go against even the less provocative interpretation of *Comcast*, which does not require classwide proof of damages in every case but does insist that they at least be part of the predominance equation. Although plaintiffs in *Comcast* did not ask to certify a liability class (or any “issues class”), the question surfaced at oral argument. Justice Ginsburg asked Miguel Estrada, a preeminent Supreme Court litigator representing Comcast, why

110. *Castano*, 84 F.3d at 745 n.21.

111. *Allison*, 151 F.3d at 422.

112. *See, e.g.*, *Emig v. Am. Tobacco Co., Inc.*, 184 F.R.D. 379, 395 (D. Kan. 1998) (permitting parts of claims to be certified if doing so “would materially advance the disposition of the litigation as a whole”) (citations omitted).

113. *See, e.g.*, *Merrill Lynch, v.* 133 S. Ct. 338 (2012) (denying petition for writ of certiorari); *accord Pella Corp. v. Saltzman*, 131 S. Ct. 998 (2011); *Healthplan Servs., Inc. v. Gunnells*, 542 U.S. 915 (2004).

114. *Compare, e.g.*, Laura Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567, 609–10 (2004) (arguing against issue certification), with Jon Romberg, *Half a Loaf is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 UTAH L. REV. 249, 334 (2002) (arguing in favor of issue certification).

115. JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 4:43, at 1012–13 (9th ed. 2012) (“The most commonly requested issue certification is that “liability” be determined on a class-wide basis, and damages to individual class members be determined at follow-on trials or other proceedings.”).

plaintiffs could not simply maintain a liability class to adjudicate the antitrust violation, leaving damages for another day.¹¹⁶ This mechanism, the Justice correctly noted, is frequently used in Title VII cases, where a pattern and practice of discrimination is determined on a classwide basis and followed by individual hearings on damages.¹¹⁷ In language and rationale consistent with the majority's eventual opinion, Mr. Estrada explained that what Rule 23(b)(3) "asks us to look at is not questions of damages versus liability, but whether the common questions predominate over those that are individual to the class members."¹¹⁸ He conceded that individual questions of damages do not always prevent (b)(3) certification, but nor, he argued, could individual questions of damages be written off entirely. Mr. Estrada reiterated the point responding to a similar question from Justice Kennedy, citing the Fifth Circuit—the only circuit that has rejected issue certification—for the proposition that individualized issues of damages sometimes overwhelm common questions of liability.¹¹⁹

Justice Ginsburg maintained her view in her dissent, citing Rule 23(c)(4) in a footnote, explaining that the majority's opinion notwithstanding, "a class may be certified for liability purposes only, leaving individual damages calculations to subsequent proceedings."¹²⁰ This observation, however, is as inconsistent with the Court's opinion as was the dissent's attempt to limit the decision to "this day and case only."¹²¹

Again, the Court's GVR orders in light of *Comcast* of the Sixth Circuit's *Whirlpool*, and the Seventh Circuit's *Sears* decisions are instructive.¹²² *Comcast* intersects on liability-only issue certification, a hitherto stalwart of (b)(3) classes.¹²³ The *Whirlpool* panel dismissed

116. *Comcast* Oral Argument, *supra* note 69, at 3–5. Justice Ginsburg explained the definition of a liability issues class: "Because generally -- at least it's my impression -- that in class certifications, if the liability question can be adjudicated on a class basis, then the damages question may be adjudicated individually." *Id.* at 4.

117. *Id.* at 4.

118. *Id.* at 5.

119. *Id.* at 10–11 ("I am actually arguing for the flip side of that issue, which is that just because [individual questions pertaining to damages] may not be preclusive in certain cases doesn't mean that it is preclusive in no case.") (citing *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 307–08 (5th Cir. 2003) (denying (b)(3) certification because calculation of damages would require "mini-trials," thus predominating over common issues of liability).

120. *Comcast*, 133 S. Ct. at 1437 n.* (Ginsburg & Breyer, JJ., dissenting).

121. *Id.* at 1437.

122. *Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768 (2013); *Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013).

123. See, e.g., *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010).

Damage calculations will doubtless have to be made under Hawaii's consumer protection laws. In this circuit, however, damage calculations alone cannot defeat

calculation of damages as an impediment to class certification, noting that “[n]o matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action.”¹²⁴ Likewise, Judge Posner, a long champion of efficiency-driven issue certification, observed that damages-related issues could not defeat (b)(3) certification: “The only individual issues—issues found in virtually every class action in which damages are sought—concern the amount of harm to particular class members.”¹²⁵ Neither court likely thought much of these statements given the relatively settled circuit-level precedent, much less anticipated that they would invite Supreme Court review. Yet it was these observations that the Court has apparently disagreed with, as nothing else in either opinion is objectionable in light of *Comcast*. As a result, and contrary to a number of district court hold-outs,¹²⁶ the days of liability-only classes—the most basic forms of issue certification—appear to be numbered.

Other, more aggressive uses of Rule 23(c)(4), like ones promoted by Judge Posner, are even easier targets. Four examples illustrate the Seventh Circuit’s view of the scope of issue certification. In *Pella Corp. v. Saltzman*,¹²⁷ a *per curiam* opinion issued by a Judge Posner panel, plaintiffs complained of leaky windows.¹²⁸ At the time of the suit, some plaintiff’s had already replaced the defective windows and thus sought damages; others wanted replacements.¹²⁹ The district court certified the former under

certification. We have said that “[t]he amount of damages is invariably an individual question and does not defeat class action treatment.” Thus, because there are no individualized issues sufficient to render class certification inappropriate under Rule 23, class issues predominate.

Id. (citations omitted).

124. *Glazer v. Whirlpool Corp.*, 678 F.3d 409, 419 (6th Cir. 2012) (quoting *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988)).

125. *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 363 (7th Cir. 2012).

126. *See, e.g., Wallace v. Powell*, Nos. 3:09-cv-286, 3:09-cv-0291, 3:09-vc-0357. 3:09-cv-0630, 2013 U.S. Dist. LEXIS 69001, at *82 (M.D. Pa. May 14, 2013) (“*Comcast* does not foreclose a district court from certifying a liability only class under Rule 23(c)(4), and Plaintiffs have satisfied the predominance requirement of Rule 23(b)(3).”); *Miri v. Dillon*, No. 11-15248, 2013 U.S. Dist. LEXIS 68211, at *2 (E.D. Mich. May 14, 2013) (“The class, as defined by the Court in this Opinion and Order, will be certified for liability purposes only.”); *In re Motor Fuel Temperature Sales Practices Litig.*, No. 07-1840-KHV, 2013 U.S. Dist. LEXIS 50667, at *108–109 (D. Kan. Apr. 5, 2013) (noting that its certification of a liability class is consistent with Rule 23(c)(4)); *Martins v. 3PD, Inc.*, No. 11-11313-DPW, 2013 U.S. Dist. LEXIS 45753, at *15 (D. Mass. Mar. 28, 2013) (“A court may certify a class as to one or more claims without certifying as to all claims alleged in the complaint.”).

127. *Pella Corp. v. Saltzman*, 606 F.3d 391 (7th Cir. 2010) (*per curiam*).

128. *Id.* at 392.

129. *Id.*

(b)(3) and the latter under (b)(2).¹³⁰ On appeal, defendant argued that because wood might rot for several reasons, proving causation for every leak would create many individual issues.¹³¹ The Seventh Circuit was not persuaded. While not referring explicitly to issue certification or (c)(4), it explained that “[p]roximate cause . . . is necessarily an individual issue and the need for individual proof alone does not necessarily preclude class certification.”¹³² Courts have discretion, it went on, “to split a case by certifying a class for some issues, but not others”¹³³

Accordingly, the Seventh Circuit affirmed the certification order entered below, noting that the class jury would not address causation, and instead decide only if the windows had an inherent defect, whether the defendant had a duty to disclose that defect, and whether it attempted to modify its warranty.¹³⁴

Similarly, in *Mejdrech v. Met-Coil Systems Corp.*,¹³⁵ the Seventh Circuit affirmed an unpublished district court order that certified, under all three Rule 23(b) subdivisions, a class of homeowner plaintiffs suing a nearby factory for alleged pollution.¹³⁶ The panel reasoned that determining whether the factory leaked the pollutant was an issue common to the class even if harm (to say nothing of its extent) to each class member from the pollution was not.¹³⁷ That the class trial would not necessarily resolve liability did not trouble the court:

If there are genuinely common issues, issues identical across all the claimants, issues moreover the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings.¹³⁸

Two other opinions authored by Posner, though not ordering or affirming (b)(3) certifications, are instructive. In *In re Allstate Insurance Company*,¹³⁹ the Seventh Circuit suggested that a (b)(3) certification would have been appropriate (even if a (b)(2) was not) to adjudicate the legality of an employment policy under ERISA, letting individual hearings determine

130. *Id.*

131. *Id.* at 394.

132. *Id.*

133. *Pella Corp.*, 606 F.3d at 394.

134. *Id.* at 395–96.

135. *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910 (7th Cir. 2003).

136. *Id.* at 911.

137. *Id.*

138. *Id.*

139. *In re Allstate Ins. Co.*, 400 F.3d 505 (7th Cir. 2005).

causation and damages.¹⁴⁰ The district court in the case embraced this suggestion and certified a (b)(3) class that would leave for individual determinations not only damages, but also questions of causation.¹⁴¹ In *McReynolds*, a case profiled earlier, the panel reversed the lower court—ironically in light of *Dukes*—and ordered limited class treatment under (b)(2) (because plaintiffs had “not yet” asked for (b)(3)) certification to determine whether two employment policies had a disparate impact on African American brokers.¹⁴² This finding alone could not establish liability because, as the defendant pointed out in its petition for certiorari to the Supreme Court, some members of the class had actually benefited from the policies.¹⁴³ Thus, even if the policies were found to have a statistical disparity affecting African Americans, liability against any one broker (along with damages) would have to be determined in individual hearings.

Common to all four opinions is the class treatment of issues that do not necessarily resolve liability, much less class claims. The Seventh Circuit is not alone in pushing issue-certification boundaries; other circuit courts have followed.¹⁴⁴ These opinions show dissatisfaction with collateral estoppel—a doctrine that already precludes re-litigation of issues resolved in other proceedings.¹⁴⁵ Judge Posner acknowledged its application in *McReynolds* but resorted to issue certification because, he explained somewhat circularly, that was the way to resolve a common issue before issue or claim preclusion set in.¹⁴⁶ How witness-heavy class trials could outrun individual suits is unclear, but claim preclusion—the relevant

140. *Id.* at 508 (“This is not to say that the case is unsuitable for class treatment. It may well be highly suitable. A single hearing may be all that’s necessary to determine whether Allstate had a policy of forcing its employee agents to quit. This issue could be decided first and then individual hearings conducted to determine which of the members of the class were actually affected by the policy rather than having decided to quit for their own reasons. Fed. R. Civ. P. 23(c)(4)(A). That would be a more efficient procedure than litigating the class-wide issue of Allstate’s policy anew in more than a thousand separate lawsuits.”).

141. *Flanagan v. Allstate Ins. Co.*, 242 F.R.D. 421, 429–30 (N.D. Ill. 2007).

142. *McReynolds v. Merrill Lynch*, 672 F.3d 482, 492 (7th Cir. 2012).

143. Petition for Writ of Certiorari at 16, *McReynolds*, 672 F.3d 482 (7th Cir. 2012) (No. 12-113).

144. *See, e.g., In re Chiang*, 385 F.3d 256, 262 (3d Cir. 2004) (permitting certification of one element of a prima facie case under the Equal Credit Opportunity Act without deciding whether class plaintiffs alleging discrimination in loan applications could show on a classwide basis that they were eligible for the loans); *In re A.H. Robins Co.*, 880 F.2d 709, 747 (4th Cir. 1989) (affirming class certification solely on the legal issue of whether an entity was a joint tortfeasor).

145. *See generally* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) (“When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.”).

146. *McReynolds*, 672 F.3d at 492.

doctrine here¹⁴⁷—does carry at least one downside: it subjects defendants to the potential re-litigation of issues against class members who opt out of (b)(3) classes and thus escape the preclusive effect of the class trial.¹⁴⁸ Aside from this possible gain in efficiency, holding independent mini-trials for every individual claim seems to undercut the idea that piecemeal class actions “materially advance [] litigation.”¹⁴⁹ More likely, they incentivize settlements,¹⁵⁰ but courts are in the business of adjudicating cases, not cajoling amicable resolutions.

The second, more serious problem of carving out discrete issues for class adjudication is the potential violation of the Seventh Amendment’s Reexamination Clause.¹⁵¹ The possibility that juries will re-examine prior courts’ findings exists every time a court certifies elements of liability,

147. See 18 JAMES WILLIAM MOORE ET AL., MOORE’S FEDERAL PRACTICE § 131.13 (3d ed. 2010) (“The basic difference between claim preclusion and issue preclusion is simply put: claim preclusion applies to whole claims, whether litigated or not, whereas issue preclusion applies to particular issues that have been contested and resolved.”); see generally 18A FED. PRAC. & PROC. JURIS. § 4455 (2d ed. 2013) (“When a class judgment adjudicates only issues, not claims, preclusion is limited by the ordinary rules of issue preclusion.”). Contrary to scattered loose references found in federal decisions, the relevant doctrine is collateral estoppel or issue preclusion rather than *res judicata* or claim preclusion because the latter precludes litigation over entire claims rather than just discrete issues. 18A FED. PRAC. & PROC. JURIS., *supra*.

148. See, e.g., *Abbott Labs. v. CVS Pharm., Inc.*, 290 F.3d 854, 855, 858 (7th Cir. 2002) (finding that an opt-out member is not bound by settlement even in the face of broad settlement language that potentially swept in an opt-out member as an affiliate of a prior litigant); *In re Transocean Tender Offer Sec. Litig.*, 427 F. Supp. 1211, 1217–18 (N.D. Ill. 1977) (precluding opt-outs in subsequent litigation would violate their right to due process); see *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326–28 (1979) (discussing that although the doctrine of “mutuality” no longer applies to collateral estoppel, issue preclusion is not limited by the fact that one of the parties could not use a prior judgment against the other had it prevailed); see also *EEOC v. United States Steel Corp.*, 921 F.2d 489, 495 (3d Cir. 1990) (supporting the proposition that class members who opt out of a class action cannot subsequently use that judgment offensively); *Crowder v. Lash*, 687 F.2d 996, 1010–11 (1982) (noting “special circumstances” that would render use of offensive collateral estoppel unfair under *Parklane*, including a “wait-and-see” approach taken by a plaintiff). Those members who remained in a class could still benefit from collateral estoppel even if the subsequent suit is before a jury. *Parklane*, 439 U.S. at 655 (holding the Seventh Amendment did not limit use of offensive collateral estoppel where defendant lost in an equitable injunctive action brought by the SEC and faced a legal action over the same issue before a jury against a new party).

149. See, e.g., *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008) (finding issue certification “would not materially advance the litigation because it would not dispose of larger issues such as reliance, injury, and damages”).

150. See *In re Chiang*, 385 F.3d 256, 267 (3d Cir. 2004) (noting that “courts commonly use Rule 23(c)(4) to certify some elements of liability for class determination, while leaving other elements to individual adjudication—or, perhaps more realistically, settlement”).

151. See generally *McLaughlin*, *supra* note 118, at 5 (stating the risks of violating the Reexamination Clause of the Seventh Amendment by certifying a class action that is limited only to the common issue of general liability).

leaving other related pieces for follow-on proceedings.¹⁵² Professor McLaughlin outlines the issue through an example reminiscent of *Mejdrech*: “findings by a ‘common’ issues jury on an abstract, generic causation question, such as whether a product or substance is capable of causing a certain injury, creates the risk of re-examination by juries deciding the ultimate question of causation-in-fact for each putative class member.”¹⁵³ Take *Pella*, for instance, where follow-on juries deciding whether leaky windows were caused by the design defect would almost certainly have to re-examine the fact of the defect, which would already have been determined. What’s more, issue certifications like the one permitted in *McReynolds* might also violate the Supreme Court’s interpretation of the Amendment by requiring equitable determinations in a bench trial (finding of disparate impact) prior to factual determinations by juries (causation).¹⁵⁴

But neither of these issues, nor the existing circuit split has piqued the Court’s interest in issue certification.¹⁵⁵ *Comcast* and *Amgen*, however, might give the Court a more direct route to reexamine the creative uses of issue certification. This article focuses on Judge Posner’s decisions because they provide particularly stark contrasts with those recently issued by the Supreme Court. To understand the diverging views, it is important to remember that Rule 23(b)(3) requires both predominance and superiority, and that only the latter requires courts to consider efficiency.¹⁵⁶

152. See *id.* (“Certifying a class action limited only to the ‘common issue’ of general liability also seriously risks a violation of the Reexamination Clause of the Seventh Amendment.”); Jenna G. Farleigh, *Splitting the Baby: Standardizing Issue Class Certification*, 64 VAND. L. REV. 1585, 1602 (2011) (“Issue class certification is therefore uniquely plagued by Reexamination Clause concerns.”).

153. MCLAUGHLIN, *supra* note 118, at. 1034.

154. See *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472–73 (1962) (“[W]here both legal and equitable issues are presented in a single case, only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.”) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510–511 (1959)); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510–11 (1959) (“In the Federal courts this [jury] right cannot be dispensed with, except by the assent of the parties entitled to it; nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. This long-standing principle of equity dictates that only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.”).

155. See, *Pella Corp. v. Saltzman*, 131 S. Ct. 998 (2011) (denying petition for writ of certiorari).

156. See FED. R. CIV. P. 23(b)(3) (permitting class actions where “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and

Long a champion of law and economics,¹⁵⁷ Judge Posner expands the role of efficiency and focuses his opinions (sometimes entirely) on the gains made by adjudicating common issues, as he put in a memorable line in *Mejdrech*, “in one fell swoop.”¹⁵⁸ He believes that class treatment is appropriate under Rule 23 when “judicial economy from consolidation of separate claims outweighs any concern with possible inaccuracies from their being lumped together in a single proceeding for decision by a single judge or jury.”¹⁵⁹ Again, Judge Posner is not alone—many judges around the country appear mesmerized by his logic, often repeating the “one-fell-swoop” line.¹⁶⁰

Now, consider how little efficiency has figured into the Supreme Court’s recent class-action jurisprudence. In *Comcast*, the Court reminded that class actions: (1) are “an exception” to the general rule of individual litigation; (2) require “rigorous analysis” of Rule 23 prerequisites; (3) call on plaintiffs to make an “evidentiary proof” of at least one of the Rule 23(b) provisions; (4) demand a “close look” if plaintiffs move to certify under Rule 23(b)(3)—a provision that was an “adventurous innovation” of the Rules.¹⁶¹ Efficiency makes no appearance. The notion that (b)(3) class treatment is appropriate if only certain issues can be adjudicated in “one fell swoop” is not only implicitly rejected by the majority—there was no dispute that liability could have been determined for the class—but gets no play in the dissent.

Even *Amgen*, a decision that sanctioned a (b)(3) class, recognized that individual issues could defeat class certification even if the most prominent issue was common to the class—an idea that is antithetic to Judge Posner-style issue certification. Rule 10b-5 securities fraud actions are not susceptible to class treatment, the Court noted, if reliance on a misstatement must be established for every class member.¹⁶² That is in

efficiently adjudicating the controversy”).

157. See generally, RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1983) (discussing the interplays between our law as written, the goals of economics in efficiency, and cost effectiveness as a way of changing social behaviors).

158. *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 911 (7th Cir. 2003).

159. *Id.*

160. See, e.g., *Augustin v. Jablonsky (In re Nassau County Strip Search Cases)*, 819 F. Supp. 2d 153, 174 (E.D.N.Y. 2011) (quoting *Mejdrech*); accord *Whitlock v. FSL Mgmt., LLC*, No. 3:10-CV-00562-JHM, 2012 U.S. Dist. LEXIS 112859, at *37 (W.D. Ky. Aug. 10, 2012); *Collins v. Olin Corp.*, 248 F.R.D. 95, 102 (D. Conn. 2008); *Schumacher v. Tyson Fresh Meats, Inc.*, 221 F.R.D. 605, 618 (D.S.D. 2004);

161. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013).

162. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013) (“Absent the fraud-on-the-market theory, the requirement that Rule 10b-5 plaintiffs establish reliance would ordinarily preclude certification of a class action seeking money damages because

spite of the common issues that could still be resolved for the class,¹⁶³ including whether defendant has made a misrepresentation and whether it did so intentionally.¹⁶⁴ Indeed, it was the promise of resolving the “case for one and for all” that drove the Court’s decision to permit (b)(3) certification in *Amgen*, and it was the inability to do so that led to the opposite result in *Comcast*.¹⁶⁵ The Supreme Court, it seems, is more interested in the resolution of an entire case than theoretical gains in efficiency made by resolving discrete issues.

CONCLUSION

At a time when other countries are “open[ing] their doors to class actions and group litigation,”¹⁶⁶ the United States Supreme Court seems intent to leave an increasingly smaller crack. “Class-action suits are coming to Europe,” The Economist announced in May 2013, noting that twenty EU members now permit some sort of collective action, with the French soon joining despite protests from businesses.¹⁶⁷ In the States, where class actions originated, Justice Scalia and four of his brethren have tightened up the requirements for the most frequent class-action plaintiff—ones who seeks damages. Whether that is a good thing depends on whom you ask. What is clear, however, is that class action jurisprudence is in a state of flux and counsel on both sides should pay attention.

individual reliance issues would overwhelm questions common to the class.”).

163. See *Amgen*, 133 S. Ct. at 1190; see, e.g., *Augustin*, 461 F.3d at 228 (2d Cir. 2006) (“That the class-wide proof comes in the form of a simple concession rather than contested evidence certainly shortens the time that the court must spend adjudicating the issue, but it does nothing to alter the fundamental cohesion of the proposed class, which is the central concern of the predominance requirement.”); That *Amgen* conceded some of these issues does not change the class-action calculus. *Amgen*, 133 S. Ct. at 1190.

164. *Amgen*, 133 S. Ct. at 1192.

165. *Id.* at 1196.

166. Deborah R. Hensler, *The Future of Mass Litigation: Global Class actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 307 (2011).

167. See *Class-action Suits are coming to Europe*, THE ECONOMIST (May 11, 2013), <http://www.economist.com/news/business/21577426-class-action-suits-are-coming-europe-chasseurs-dambulances>.